

U.S. Department of Labor

Office of Administrative Law Judges
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55 West Queens Way
Hampton, Virginia 23669
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In the Matter of
VIRGINIA ALGONQUIAN TRIBES

v.

U.S. DEPARTMENT OF LABOR
.....

DATE ISSUED: May 16, 1984
CASE NO.: 84-JTP-5

Audrey D. Holmes, Esq.
For the Claimant

Marcia A. Lurensky, Esq.
For the Defendant

BEFORE: ROBERT J. BRISENDEN
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Job Training Partnership Act (JTPA), 29 U.S.C. §1501 et seq., and the Rules and Regulations issued thereunder; 20 C.F.R. §629 et seq. Pursuant to 20 C.F.R. §629.57, the Applicant seeks a hearing on and review of its non-selection as a potential grantee for a competitive 1984 grant award.

A prehearing conference was held in Hampton, Virginia on February 23, 1984, at which all parties were present. During this proceeding the issues were narrowed and various motions were submitted to the Court. On April 11, 1984 in a telephone conversation with Attorney Advisor Robin A. Rattley, both sides formally waived the right to appear at the hearing then scheduled for April 12, 1984. Accordingly, the hearing was cancelled.

This action is brought by the Virginia Algonquian Tribes (VAT) of Providence Forge, Virginia, for a determination of whether the Grant Officer's Decision on VAT's application was proper.

E-ALJ-000331

The Virginia Algonquian Tribes (VAT) is a consortium of four (4) Indian Tribes, all within the State of Virginia. Each consortium member enjoys official recognition as an Indian Tribe by Act of the Virginia Legislature (Adm. File, p. 25).^{1/} On June 13, 1983, VAT applied for Federal Assistance in the operation of the Comprehensive Employment and Training Program, to provide employment and training services to the unemployed under employed and economically disadvantaged Indians and Native American population in Virginia (Adm. File, p. 22).

The Department of Labor has the burden of production to support the Grant Officer's Decision. This requires the preparation and submission of an administrative file in support of the decision. Thereafter, the Claimant, seeking to overturn the decision, shall have the burden of persuasion. 20 C.F.R. §629.57(i).

The Department has met its burden of production, having complied with the March 1, 1984 and March 21, 1984 orders of this office pertaining to the production of certain documents. The burden is now on VAT to show that there was no rational basis for the Department's decision, or that it acted in an arbitrary or capricious manner.

Judicial review of discretionary administrative action is limited to the question of whether the applicant has been accorded procedural due process and whether the decision has been reached in accordance with the applicable rules of law. Furthermore, the inquiry goes to the question of whether or not there has been an exercise of administrative discretion and, if so, whether or not the manner of exercise has been arbitrary or capricious. Henry v. Immigration and Naturalization Service, 552 F. 2d 130 (1977). Agency action based on the exercise of accumulated agency expertise is not to be lightly set aside unless it is apparent that it is unsupported by substantial evidence or is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Simeon Management Corp. v. FTC, 579 F. 2d 1137, 1142 (9th Cir. 1978).

A substantial number of documents were submitted into evidence, including the administrative File and subsequent supplemental documents. These documents consisted of the full application package submitted by VAT, all applicable correspondence, and an explanation of the criteria and procedures used in reviewing an application. The Grant Officer having complied with the orders of this Court, I find the record to be complete, and sufficient upon which to issue a decision in this matter.

VAT's application was reviewed by a panel of Employment and Training Administration Staff. A Solicitation for Notices of Intent (SNOI), with all the necessary information and requirements for the program were given to all organizations interested

^{1/} All of the Administrative file, as constituted at the prehearing conference, and the documents subsequently submitted are accepted into evidence. Prehearing documents submitted by Claimant are also accepted into evidence, all relevant material having been found to be duplicated in the Administrative file, and identified by the exhibit numbers thereof.

in submitting a Notice of Intent to apply for Program Year 1984 Funds.^{2/} All applicants in VAT's geographic area were reviewed on the basis of their capability to administer an Indian and Native American Employment and Training Program. (Admin. File 40)

In this instance there were only two applicants in this geographic area, the Virginia Algonquian Tribes and the Mattaponi Pamunkey Monacan consortium (hereinafter, Mattaponi). (Admin. File 12).

The capability of an applicant "to administer" an employment and training program is determined by three factors (See Footnote 2). The first consideration is an applicant's previous experience in operating an effective program of this type. VAT out-scored the Mattaponi in this category and a review of the file does not indicate any abuse of discretion. All three panelists gave VAT higher scores in this area (Admin. File 150-158, 168-175).^{3/}

2/ BASIC ELIGIBILITY REQUIREMENTS. To be eligible for designation, an applicant must have:

- a. A governing body;
- b. An Indian or Native American population within its designated service area of at least 1,000 persons;
- c. The capability to administer an Indian and Native American employment and training program. For purposes of this paragraph, "capability to administer" means that the applicant can demonstrate that it possesses, or can acquire the managerial, technical, or administrative staff with the ability to properly administer grant funds, develop employment and training opportunities, evaluate program performance and comply with the provisions of the Act, DOL regulations at 20 C.F.R. 29-70, and forthcoming regulation specific to this program. Evidence of "capability to administer" may consist of such factors as:
 - (1) Previous experience in operating an effective employment and training program serving Indians or Native Americans;
 - (2) The number and kind of activities of similar magnitude and complexity that the applicant has successfully completed;
 - (3) Information from other Federal agencies regarding program performance or financial and management capability.

(Admin. File 43-44)

3/ Documents submitted into the file on the Grant Officer's Motion to Supplement are identified as Admin. File 145-184.

Paul G. Mayrand Affidavit (Admin. File 145)
Melvin Goldberg Affidavit (Admin. File 146-148)
Selection Summary Report (Admin. File 149-152)
Individual Panel Rating Sheet (Admin. File 153-184)

The second consideration is the number and kind of activities of similar magnitude and complexity that the applicant has successfully **completed**. The score for VAT was 22, compared with 23 for the Mattaponi (Admin. File 150). The scoring was very close in this category, and varied **from** panelist to panelist for both tribes. **The comments** of the panelists were consistent with the scores given, and all indications were that proper consideration of the applicable factors was afforded.


Information from other Federal agencies **regarding** program performance or financial and management capability is the third consideration. The Mattaponi outscored VAT by a wide margin in this category. Again, **however**, the **comments** of the panelists were consistent with the scores given. **The** financial operating plan for the **Mattaponi** was rated high, while **VAT's** financial operating plan was found to be "technically unacceptable". The panel, **in** fact, found little or no financial plan or system for **VAT**" (Admin. File 150). Panel member C noted no financial statement at all (Admin. File 158).

Paul **Mayrand**, Acting Director, Office of Special Targeted Programs, **Employment** and Training Administration, and Melvin Goldberg, Office of Contracting, **Employment** and Training Administration, submitted affidavits confirming the completeness of the file, the criteria used, and the procedures **followed** in the application process (Admin. File 145-148). There is no doubt that said Office considered all documentary evidence in the review.

The Administrative File lacks any evidence of abuse of discretion or capriciousness, **and** supports the finding of the Grant Officer. VAT requested a review of its application, which I have conducted, and I find no reason to overturn or question the selection of the Mattaponi.

VAT has failed to offer or show any specific areas of abuse by the panelists in their selection of the Mattaponi application. Indeed the panelists' notations indicate care and attention to pertinent factors. **The** panelists' evaluations show serious thought and consideration. Weighing the financial planning, included in **VAT's** application, caused the main difference in the two applicant's **scorings**, and the **Mattaponi's** selection as the 1984 grantee.

Weighing and considering all of the evidence **submitted**, I find the Grant Officer's decision in the selection of the Mattaponi Pamunkey **Monacan** to be rational. Accordingly, the Grant Officer's selection is upheld.


ROBERT J. BRISSENDEN
Administrative Law Judge

RJB/RAR/11k

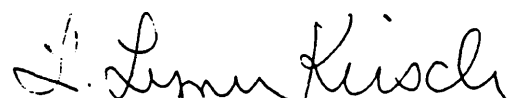
SERVICE SHEET

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TITLE OF DOCUMENT: DECISION AND ORDER

I hereby ~~certify~~ that on May 16, 1984, a copy of the foregoing ~~document~~ was sent to the parties and their representatives at their last known addresses listed below:


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